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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1091

AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY and JAMES A. DOOLEY FOUNDATION,
a charitable corporation,

Petitioners,

vs.

JOHN W. CLARKE and JOHN W. CLARKE CO.,
a corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on July 14, 1969, which affirmed a judgment of the District Court for the Northern District of Illinois entered upon the verdict of a jury finding the issues for the respondents.

OPINION BELOW.

No opinion was rendered by the United States District Court. The opinion of the Court of Appeals for the

Seventh Circuit affirming the District Court's judgment is reported as an Appendix to 415 F. 2d Advance Sheet No. 4.

JURISDICTION.

The order of the Court of Appeals for the Seventh Circuit sought to be reviewed was entered on July 14, 1969. Petitioners filed a timely petition for rehearing, which was denied on October 21, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Can the same Circuit Court of Appeals in one case hold that rules for the protection of investors state a separate and independent cause of action from counts predicated on the Securities Acts and the rules promulgated thereunder, and in this case hold that the dismissal of a count alleging the violation of similar rules, while improper, is not erroneous?

2. Are investors' actions under the Securities Acts and the rules thereunder to be tried as common law fraud actions, so that proof of deliberate intent is required, profits on other transactions admitted, together with evidence of what the stock would have been worth had it not been sold?

3. In investors' actions against an underwriter under the Securities Acts and the rules thereunder, can a Court frustrate the Congressional policy of full disclosure and fail to recognize the fiduciary relationship as a matter

of law? This decision is in direct conflict with a recent case of the Second Circuit.

4. Can Rule 51 of the Federal Rules of Civil Procedure be employed by a Court of Appeals to avoid passing on objections concerning an admittedly erroneous instruction, when the same objections were timely urged in the District Court in writing and regarded as such by the District Judge?

STATEMENT OF THE CASE.

The Court of Appeals in its opinion provided no statement of facts, but merely cited the allegations of plaintiffs' complaint.

The opinion of the Court of Appeals does not set forth the facts. Hence a statement will be necessary. In the interests of simplicity, we shall first set forth the facts about which there was no contradiction.

The respondent John W. Clarke & Company was registered with the National Association of Security Dealers and with the Securities and Exchange Commission. (A. 270) Neither Clarke nor his company had ever been members of any stock exchange. (A. 422) In the City of Chicago, where the respondents operated, there are only six brokerage houses without seats on any Stock Exchange. (A. 842, 843)

Members of a stock exchange receive a prescribed commission of about ¾ of 1% on stock transactions. (A. 297-299) Stock exchange members are prohibited from splitting commissions with non-members. (A. 298) The employees of the Clarke Company were himself and his wife. (A. 270)

Petitioner James A. Dooley acted on behalf of himself and the other petitioners. He is a Chicago lawyer. He is extremely active as a trial and appellate lawyer. He has contributed to his profession in lecturing at law schools, bar associations, authoring numerous law review articles, and revising Judge Cooley's work on torts. (A. 439-441)

The District Judge stated:

> "The Court: As far as his (petitioner Dooley's) activities are concerned, this Court is willing to take judicial notice of the fact that he has been on trial practically all of the working hours of the time. . . . I am willing to take judicial notice, because I have many times called him myself for trial and found him engaged regularly and consistently. There is no question about that counsel." (R. 1478, A. 740)

The respondent John W. Clarke knew that Dooley devoted virtually all of his time to the practice of law. He wrote to Dooley from time to time and made such statements as the following:

> "Knowing your busy schedule . . .
>
> "When you get your heavy burden of court off your shoulders. . . ." (P. Ex. 12)
>
> "I know you, like everyone else, must have fifty times more to read than you have the time in which to do it. . . .
>
> "If you can possibly find the time to read this. . . ." (Pl. Ex. 13)
>
> "I know you don't have time to think of your investments. . . ." (Pl. Ex. 14)

From 1938 or 1939 to 1960, Dooley had purchased securities from Baker, Walsh and Company. (A. 425) John F. Baker, a firm member, and Dooley had been law school

classmates. (A. 423, 425) At the end of 1960, Baker left the security business to return to the practice of law. (A. 423, 426)

Baker acted as Dooley's financial adviser from 1946 to 1960. (A. 443) Baker consulted with Dooley through those years. (A. 425, 431)

Baker, Walsh and Company never handled any underwritings (A. 423, 430) and never owned any inventoried stocks or bonds. (A. 423) The company was licensed as a stock broker-dealer and was a stock exchange member. (A. 423)

On July 21, 1958, respondent Clarke telephoned Dooley and invited him to lunch. (A. 308, 309, 444) Clarke had read an article in the Wall Street Journal of July 7, 1958, (A. 309, 311) concerning a case wherein Dooley had received a fee of $150,000. (Pl. Ex. 6) Clarke's purpose in having the luncheon was to sell securities to Dooley. (A. 311, 444, Pl. Ex. 7)

Dooley purchased $30,000 in bonds from respondents in 1958 (A. 983, Pl. Ex. 142, 434) and $35,000 in bonds in 1959. (A. 984, Pl. Ex. 145) These transactions were not the subject matter of petitioners' complaint.

The relationship out of which this action arose commenced in 1960, when Baker was returning to the practice of law. (A. 448) This is manifest by Resp. Ex. 36, a suggested program prepared by Clarke for Dooley dated September 14, 1960. (A. 966)

During this period, Clarke sold petitioners certain securities, and petitioners sustained substantial losses.

A chart tells the facts more succinctly than words:

Issue	*Date Acq'd*	*Respondents' Profit**	*Petitioners' Loss***
American Nat'l Ins.	11/13/61	$ 512.60	$ 1,287.40
Ariz. Pub. Serv. Co.	11/1/61	801.20	27,993.10
Ariz. Pub. Serv. Co.	9/18/62	1,000.00	21,619.78
Arlan's Dept. Stores	9/26/61	695.75	1,592.40
	5/10/62		
Business Cap. Corp.	2/8/61	3,700.00	21,261.48
Calandra Photo	8/9/61	235.00	510.15
Champion Spark Pl.	11/16/60	540.00	1,687.88
Cowles Mag. & Broad.	10/30/61	680.00	4,530.88
Ford Motor	6/17/61	1,040.00	652.35
	2/24/62	1,015.00	
Handschy Chemical	11/20/61	900.00	5,142.72
Rich. D. Irwin	8/29/61	234.00	1,406.86
Krylon Inc.	3/13/62	510.00	3,946.80
Marsh & McLennan	3/20/62	820.00	2,850.80
Metro-Goldwyn-Mayer	3/13/61	898.60	12,638.76
Morse Shoe Co.	4/5/62	568.00	5,566.20
North Am. Accept.	11/29/61	400.00	2,384.98
Pauley Petroleum	1/19/62	547.60	18,547.60
Pioneer Nat'l Gas		346.90	22.20
Tip Top Products	12/14/61	3,460.00	39,617.85
Western Nat. Gas	11/2/61	1,315.15	24,789.18
	2/15/62		
	3/16/62		
Total Respondents' Profit		$20,219.80	
Total Petitioners' Loss			$198,049.37

* As partially disclosed by respondents' answers to interrogatories (A. 45-6) and summarized in petitioners' Ex. 77, not received in evidence but offered as part of offer of proof (A. 1275-6) and in petitioners' Ex. 20, received in evidence. (A. 420)

** As partially disclosed by respondents' answers to interrogatories (A. 39-44) and summarized in petitioner's Ex. 82, received in evidence.

The percentage of Clarke's total allotment sold petitioners and his profit per share are very telling:

Issuer	*Percentage of Respondents' Shares Sold to Petitioners*	*Profit Per Share***
*Arizona Public Service Co.	100%	$ .50
Arlan's Dept. Stores (1)	11¼%	1.75
Arlan's Dept. Stores (2)	33¾%	1.75
Business Capital Corp.	50%	1.00
Calandra Photo Co.	33⅓%	.80
Champion Spark Plugs	40%	1.35
Cowles Mag. & Broadcast	20%	1.10
*Ford Motor Co. (1)	33⅓%	2.65
*Ford Motor Co. (2)	41⅔%	3.00
*General Motors Corp.	40%	1.00
Handschy Chemical	25%	1.02
Inland Life Ins.	50%	.24
*International Harvester Co.	100%	1.57
Richard D. Irwin	33⅓%	1.28
Kellwood Co.	40%	1.40
Krylon Inc.	40%	.85
Marsh & McLennon	25%	2.10
Morse Shoe Co.	32%	1.20
North American Acceptance	66⅔%	.40
Northern Illinois Gas	20%	1.00
Sel-Rex Corp.	25%	1.98
Tip Top Products	50%	4.90
"21" Brands, Inc.	16%	.80

* Listed on New York Stock Exchange but recommended and sold to petitioners by Clarke only when underwriting or secondary issue involved.

** Taken from Pl. Ex. 33, (R. 828-830) and Clarke's testimony (A. 374 et seq.).

On Clarke's advice, petitioners sold Business Capital Corporation and purchased California Growth. So also on his advice they sold Calandra Photo, Richard D. Irwin, Handschy Chemical, Tip-Top Products, Western Natural Gas, Pauley Petroleum, Cowles Magazine and Broadcasting, Krylon and Marsh and McLennan. (A. 410, 409, 411, 484, 412, 475, 479, 480, 481)

During this period, Clarke never advised petitioners to purchase New York Stock Exchange stocks, unless he was acting as an underwriter or a member of a selling group. (A. 410) So also was it uncontradicted that when Dooley would ask Clarke about a security listed on an exchange, Clarke would tell him it was a poorly managed company. (A. 449) Clarke himself said: "I might have told him that in an effort to persuade him not to purchase the security." (A. 351)

Dooley and his wife were guests for dinner in the home of Clarke and his wife during 1961 and 1962 (A. 315, 451-2); the Dooleys were entertained at the Saddle and Cycle Club by the Clarkes in 1961 (A. 316-452); the Clarkes were guests for dinner in the Dooleys' home (A. 316, 317, 452); Dooley and Clarke went on a retreat together in December, 1960, at Bellarmine Hall (A. 316, 451); Dooley was invited to lunch by Clarke on ten or twelve occasions (A. 314, 452); Clarke and his wife rendered some assistance to Dooley and his wife in connection with an adoption problem (A. 317-18), and Clarke obtained San Francisco hotel accommodations for Dooley in 1962 (Pl. Ex. 18), and throughout his correspondence referred to Dooley as "Dear Jim." (A. 317)

Clarke testified that he considered himself and Dooley to be "companionable friends." (A. 317)

Clarke telephoned many times. (A. 314, 318-9) When he could not reach Dooley, he left messages. (A. 318) Dooley's office kept a record of the times Clarke called but did not talk to Dooley. These showed 83 messages between July 1958 and February 1963. (Pl. Ex. 7; A. 699; A. 318-19) There were: 1 message in 1958; 5 messages in 1959; 12 messages in 1960; 27 messages in 1961; 35 messages in 1962, and 3 messages in 1963. (Pl. Ex. 7) Clarke stated that frequently when he called Dooley, Dooley was in court (A. 319-20), and that at times he called Dooley early in the morning before he went to court. (A. 320)

In conversation with Dooley's secretary, Clarke would refer to Dooley as "our favorite slave" or "Dirty face" —which he said were friendly salutations. (A. 319)

Clarke admitted that on three occasions he told Dooley he was buying for his wife the same securities he was recommending. He listed three separate securities: Champion Spark Plug (A. 335), Sel-Rex (A. 366-7) and Northern Illinois Gas Co. (A. 389) Dooley contended that Clarke's customary approach was that he had bought the identical security for his wife. (A. 470)

Marcella Niehoff, a widow, (A. 539) stated that Clarke often invited her to dinner at his home (A. 539, 572); that shortly after such dinners Clarke would telephone her and recommend she purchase certain securities (A. 539, 540), and that several times he said (A. 544): "This stock is good, because I just bought a block of it for my wife Maude." (A. 542)

During the acquisition of the above securities, Dooley did not know in what capacity the respondents were acting. (A. 457, 486) Dooley first learned of it in April 1963,

when another broker informed him that respondents had been selling to the petitioners as principals at an unusual profit. (A. 457, 492) Dooley would not have purchased the securities if he had known of the respondents' real interest in those securities, namely, if he was confining his recommendations to situations where he was an underwriter or member of a selling group, and thus making a substantial profit. (A. 491, 716)

Dooley did not know that the respondents were not members of any stock exchange. (A. 714-715)

Respondents failed to provide petitioners with final prospectuses with or before confirmations, although the confirmation reads: "copy of prospectus has been forwarded to customer." (A. 271, 272, 273 and see Pl. Ex. 1) It is sent with the confirmation, if it is available, (A. 273) and in many cases is sent out after the confirmation. (A. 273, 276) The sale becomes effective upon the confirmation (A. 272) so the customer does not see the final prospectus until after the sale has been completed. (A. 287) Petitioners were never advised by respondents that in most of the transactions, respondents were acting as underwriters, and in at least one, as a market-maker, except that the confirmations showed an "X" mark in a box purporting to show respondents acted as "principal" or "agent" in each transaction.

The only controverted facts turn around: (a) Dooley's testimony that generally Clarke advised him he was buying for his wife the same security he sought Dooley to purchase; and (b) what occurred at the September 1960 luncheon, the beginning of the relationship.

At the September, 1960, luncheon according to Dooley, he told Clarke that Baker was going out of the securities business, and that Dooley was, therefore, contemplating engaging the investment services of Stein, Roe and Farnham (A. 448), who are investment counselors rather than brokers or dealers. (A. 349) Dooley further told Clarke that he devoted all of his time to his profession and had no time to look after investments. (A. 450) Clarke told Dooley that he had been on LaSalle Street since he was a boy, was well acquainted with all phases of financial work and would give Dooley his personalized attention, (A. 449) and would be happy to look after Dooley's investments. (A. 450)

Clarke admitted he took Dooley to lunch on September 16, 1960, but denied that Dooley mentioned Baker or Stein, Roe and Farnham. (A. 348-9) However, Clarke admitted that as part of his business, he tells people what they ought to or ought not to buy, tells them the good points and bad points of securities and recommends securities when "I have in mind their particular needs, or I at least attempt to evaluate their needs in connection with the security." (A. 312)

The petitioners suffered the following losses on its transactions with the respondents (Pl. Ex. 82):

Virginia P. Dooley	$69,061.63
James A. Dooley	92,601.90
Avern Trust	29,280.50
James A. Dooley Foundation	7,105.34
Total losses	$198,049.37

REASONS FOR GRANTING THE WRIT.

1. This decision is in direct conflict with another decision of the same Court of Appeals on the same matter of Federal law.

The opinion in this case is directly contrary to *Buttrey* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 410 F. 2d 135 (7th Cir., 1969), decided by same Court of Appeals.

Petitioners urged error in the District Court's dismissal prior to trial (A. 153) of the second count of the amended complaint (A. 85-5), based on respondents' violations of certain Sections of Article III of the Rules of Fair Practice of the National Association of Securities Dealers (N.A.S.D.) promulgated under the Securities Exchange Act of 1934. These sections provide, inter alia, as follows:

> "Section 1. A member, in the conduct of his business, shall observe high standards of commercial honor and justice and equitable principles of trade."
>
> "Section 2. In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

This Court of Appeals conceded that under *Buttrey* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, the district court in this case "improperly dismissed the claim for violation of section 2" because section 2 is intended "for the direct protection of investors."

The *Buttrey* case involved the "Know Your Customer Rule" or "The Rule of Due Diligence," of the New York

Stock Exchange, which was held to authorize an implied private right of action because it was intended to protect the public.

The Court of Appeals admitted that the N.A.S.D. rules are for the protection of the public as is Rule 405 of the New York Stock Exchange. It held that the district court improperly dismissed the claim for violation of section 2 of the N.A.S.D. Rules, but concluded "plaintiff was not prejudiced by dismissal because the same theory was incorporated under the claim for violation of section 15 of the Securities and Exchange Act * * *". (Opin. p. 7a) This conclusion is without basis. It is no more correct than affirming a dismissal of an action under the Federal Safety Appliance Act because the jury found for the defendant under the Federal Employers' Liability Act. The Court of Appeals (a) itself made an election of remedies causing petitioners to travel the more difficult road; (b) affirmed an admittedly erroneous dismissal of a court which could well be the basis of a favorable jury verdict.

The N.A.S.D. rules were adopted pursuant to Section 15A of the Securities Exchange Act of 1934, not pursuant to Section 15 (an entirely separate and different section of the act).

Plaintiffs' Count I, which was the only count tried by the jury, was based on Sections 12(2) and 17(a) of the Securities Act of 1933 and on Section 10(b) (and Rule 10 b-5 promulgated thereunder) of the Securities Exchange Act of 1934 (A. 81-2).

Section 15(c)(1) provides:

> "No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the

purchase or sale of, any security (other than commercial paper, bankers' acceptance, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive or other fraudulent device or contrivance. * * *"

Rule 15c 1-2, promulgated under Section 15(c)(1) reads as follows:

"(a) The term manipulative, deceptive or other fraudulent device or contrivance, as used in section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

"(b) The term manipulative, deceptive or other fraudulent device or contrivance, as used in section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

"(c) The scope of this rule shall not be limited by any specific definitions of the term manipulative, deceptive, or other fraudulent device or contrivance contained in other rules adopted pursuant to section 15(c)(1) of the Act."

Neither Section 15 (Section 15(c)(1)) nor the rule promulgated thereunder (Rule 15c 1-2), relied upon by the petitioners in Count I, bears any resemblance to the sections of the N.A.S.D. rules, which have definite specific prohibitions.

In *Buttrey,* this same Court of Appeals held each of the three counts stated a separate cause of action. Count

I was based on Rule 405 of the New York Stock Exchange; Count II "was based on the same factual allegations" and alleged a violation of Section 17 of the 1933 Act and Rule 10 b-5 under the 1934 Act; and Count III alleged violations also of Section 17 and Rule 10 b-5.

If the three counts in *Buttrey* stated separate causes of action, the two counts in this case stated separate causes of action and the Court of Appeals erroneously held that Count I incorporated "the same theory" as Count II. Petitioners were entitled to a jury determination on Count II.

2. This statutory action was tried as if it were a common law fraud case; in exacting proof of "intentional and deliberate" wrongdoing, and admitting evidence of other transactions on which the investor profited, this opinion conflicts with decisions of this Court and those of the Second and District of Columbia Circuits.

Today actions between investor and broker represent a substantial segment of civil litigation. There has been no decision of this Court articulating the guidelines for the trial of cases under this Act of Congress. Until this Court acts, problems arising under this federal statute, which must have a uniform interpretation, will be interpreted in the same patchwork fashion as actions under the Federal Employers' Liability Act were prior to this Court's intervention three decades ago.

Here the District Court and the Seventh Circuit Court of Appeals have exacted that plaintiff, in an action under this statute, prove intentional and deliberate wrongdoing by defendants, allowed evidence of investors' profits on other transactions not in violation of the Act, permitted evidence as to market fluctuations after the sale

by the investor, notwithstanding the statute itself fixes the damages (15 U.S.C. 77L).

Above all, there was a refusal to recognize the fiduciary relationship which existed between petitioners and respondents. At the instance of respondents, over petitioners' specific objections, the jury was instructed thus:

> "You are instructed that in order for you to return a verdict in favor of the plaintiffs on such charge, *you must be convinced that the plaintiffs have established by a preponderance of the evidence each and every one of the following propositions*: . . .
> "(2) *That* the defendants in connection with sales of securities to plaintiffs made false statements of material facts or omitted to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading *and that* the acts, practices, and course of conduct engaged in by the defendants constituted a device, scheme or artifice to defraud *and that* the said acts, practices and course of conduct did operate as a fraud or deceit upon the purchasers, and
> "(3) *That said alleged false statements, omissions, acts, practices and course of conduct were intentional and deliberate.*" (Emphasis added.)

The Court of Appeals regarded intent necessary, saying: "The specific intentional and deliberate violations of the anti-fraud of the Act charged were that the defendants sold to the plaintiffs a substantial portion of each underwriting Clarke and Company participated in . . ." (Opinion p. 2a)

This Court pointed out in *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), in construing the Investment Advisers Act of 1940, and granting the Commission an injunction:

> "It would defeat the manifest purpose of the Investment Advisers Act of 1940 for us to hold, therefore, that Congress, in empowering the courts to enjoin any practice which operates 'as a fraud or deceit,' intended to require proof of intent to injure and actual injury to clients." (p. 192)

But this opinion does not seem to have resolved this issue in investors' actions under the Securities Acts. Thus in the recent case of *Globus, et al.* v. *Law Research Service, Inc., et al.,* Docket Nos. 32766-68, decided September 8, 1969, by the Court of Appeals for the Second Circuit, that Court noted that in actions under the Securities Act, the question of intent to defraud "has been the subject of much debate. See, e.g., *SEC* v. *VanHorn,* 371 F. 2d 181, 185 (7th Cir. 1966); *Ellis* v. *Carter,* 291 F. 2d 270 (9th Cir. 1961); *Royal Air Properties, Inc.* v. *Smith, supra; Fishman* v. *Raytheon Mfg. Co., supra; Weber* v. *C.M.P. Corp.,* 242 F. Supp. 321 (S.D. N.Y. 1965); Bromberg, Securities Law, §§ 2.6(1), 2.7(1); 6 Loss, *supra,* at 3552-53, 3883-88." It continued thus: "But the trend is clearly away from enforcing a scienter requirement equal to the 'intent to defraud' required for common law fraud. Before there may be a violation of the securities acts there need not be present all of the same elements essential to a common law fraud, see *SEC* v. *Great American Industries,* 407 F. 2d 453, 463, cert. denied, ... U.S. ..... (my concurring opinion)."

Petitioners tendered their Instruction No. 25:

> "In order for the plaintiffs to recover for a violation of the securities laws it is not necessary that they prove that the defendants had a fraudulent intent." (A. 1426)

Further demonstration of the common law concept of this statutory action was manifest in allowing respond-

ents to show profits by petitioners on transactions other than those in issue. (A. 589, 595, 617, 622, 649, 650, 659-60, 671) In such an action, the only issue is whether the defendant violated the Act on issues complained of. If the law were otherwise, it would permit the violating broker to tell the defrauded investor that on certain other transactions the investor had made a profit.

The Court of Appeals opinion of the Seventh Circuit is directly counter to that of the Second Circuit in the *Globus* case, (*Globus, et al.* v. *Law Research Service, Inc., et al.,* Docket Nos. 32766-68, U.S.C.A. 2d Cir.) where Judge Kaufman stated:

> "But, Judge Mansfield was correct in stating the issue to the extent of the loss the plaintiffs suffered as a result of their sale, not whether subsequent transactions in the stock led to a profit. Any other concept would prevent one from suing an issuer of stock even for the most flagrant violations."

To the same effect is the District of Columbia Court of Appeals in *Hughes* v. *S.E.C.,* 174 F. 2d 969, 974.

Another manifestation of improper use of common law concepts was the admission in evidence, over petitioners' objection, of respondents' Exhibits 169 to 175 inclusive. (A. 1123-1153, 1189) These were charts of transactions not in issue, profits realized, profits unrealized, and the stock market as of March 6, 1964, the date of the filing of the suit, notwithstanding that petitioners had admittedly sold the securities and sustained the loss. This fact fixed their damages under the statute. (15 U.S.C. 77 *l*)

If a broker-dealer, who defrauds an investor, can urge that the investor would have sustained no loss had he held the security in question, then the acts and the rules of the Commission are meaningless.

The frustration of the Congressional policy of full disclosure was complete when the Court of Appeals considered this case as one involving "a dealer and his customer." It is well established that an underwriter or a market-maker is a fiduciary as a matter of law.

In *Globus* v. *Law Research Service, Inc.*, ... F. 2d ..... (2nd Cir., 1969), the Court of Appeals said:

> "And Congress intended to impose a 'high standard of trusteeship' on underwriters."

The Court cited Kroll, "Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of Barchris and Globus," 24 Business Lawyer 681 (1969) at page 687, where the following appears:

> "We all know that Congress intended that Section 11 would impose on management and underwriters who sponsor and issue a high standard of trusteeship and a 'duty of competence as well as innocence.' [H.R. Rep. No. 85, 73rd Cong., 1st Sess. (1933) 3, 5, 9; S. Rep. No. 47, 73rd Cong., 1st Sess. 5 (1933)]. The section was intended to 'promote careful adherence to the statutory requirements.' "

See also: *Hughes* v. *Securities & Exchange Com.*, 174 F. 2d 969 (C.A. D.C.), which cannot be reconciled with this decision, and Cohen's analysis of the status of broker-dealer as a fiduciary, Duke University Law School, "Conference on Securities Regulation" (Commerce Clearing House, 1965) pp. 60-61.

It must be remembered that of the twenty transactions in issue, fourteen involved respondents as underwriters, and a fifteenth as a market-maker.

The Court of Appeals did not address itself to this question of law, but stated: "* * * here, the jury, by vir-

tue of its general verdict, necessarily found that such a relationship did not exist." (Op. p. 3a)

Of course, there is no proposition of law that a general verdict has any such significance, particularly when error has intervened.

3. The decision interprets Rule 51 of the Federal Rules of Civil Procedure so that it is impossible to have a court of review pass upon objections to instructions—a deleterious effect upon the future administration of this rule.

We have already set forth respondents' given Instruction 18, *ante,* p. 16, whereby, in order to recover, petitioners were required to prove: (a) all the elements of wrongdoing provided for by the Act and rules, although the Act and the rules are in the disjunctive "or" and (b) deliberate and intentional wrong.

The error described by the Court of Appeals was as follows:

> ". . . the elements of wrongdoing are connected by the word 'and' in the instructions given, whereas, the Act and Rules join them by the disjunctive word 'or'." (Op. p. 6a)

In the applicable statute and rules (Section 17(a) of the 1933 Act and Rule 10b-5 and Rule 15c 1-2), the first two "ands" in paragraph 2 of the instruction are "ors" and paragraph 3 of the instruction is not in the statute.

The Court of Appeals stated that "With reference to Instruction No. 18, plaintiffs' counsel merely stated that it was repetitious" and that this was an inadequate objection under Rule 51.

The record shows that petitioners objected in writing, and these objections to this instruction covered the exact grounds urged in the Court of Appeals.

The conference on instructions commenced on Friday, January 26, 1968 (A. 1286) and petitioners' objections to respondents' instruction No. 18 covered four pages of the record (A. 1303-1306), including a continuing objection by petitioners as to the magnitude of the burden of proof which No. 18 saddled upon petitioners.

The conference on instructions was adjourned to Monday, January 29 (A. 1325). When the conference on instructions was resumed on Monday, the following occurred (A. 1326-7):

> "Mr. Dooley: Your Honor, we prepared some written instructions—written objections—to the defendants' tendered instructions.
> "The Court: If we have written objections that will save us time. Leave is granted to plaintiffs to file its objections to the tendered instructions in written form, and *it will not be necessary to hear anything any further on that.*
> "Mr. Flynn: I don't even have a copy of it, your Honor.
> "The Court: That is what I am saying, *I will retire and study them.* You will take time to look at them and then I will hear you briefly on that and very briefly and rebuttal, because these are very extensive. So we will handle it in that manner." (Emphasis added.)

It is obvious that the written objections were part of the conference and were regarded as such by the District Court and counsel.

The written objections covered 15 pages and included eight specific objections to respondents' instruction No.

18 (A. 163-165), including the following objections (A. 164):

> *"Defendants' Tendered Instruction No. 18*
>
> "Plaintiffs object to this Instruction for the following reasons:
>
> * * * * *
>
> "D. *Refers to the Sections by Terminology which is improper since the jurors will not have the correct terminology of the Statute. We refer to Sections (a) (1) (2) and (3):*
>
> * * * * *
>
> "F. *Paragraph 2 of the said complaint [should be 'instruction'] requires the plaintiffs to prove certain facts in the conjunctive 'and that the acts, practices' etc., whereas under plaintiffs' complaint and in the law in this case there can be a recovery upon proof of any charge within the complaint* . . .
>
> "G. *There is no requirement under the Act as set forth in paragraph (3) of this Instruction to prove that the omissions, acts and courses of conduct 'were intentional and deliberate.' To hold that the plaintiffs had to do this is to place upon them an onus with the law which the law does not.*" (Emphasis added.) (A. 164, 165)

The objection was made as clearly and specifically as possible.

The written objections were made during, and in fact at the very beginning of, the Monday conference (A. 1326-27).

The district court stated in the record that prior to the charge he would take a recess to retire and study the written objections (A. 1326). The following occurred (A. 1346):

"The Court: Well now, counsel, you have given me a 15-page written, which I am going to file, and *your record is protected.*"

* * * * *

"The Court: All right, let the record show that this Court has given a hearing for the purposes of conforming to the rules in order that all instructions may be submitted and that all may be objected to by the respective parties *in order to preserve the record for possible appeal.*

"Mr. Barnett: (Counsel for Plaintiff) *And our written objections will stand.*"

"The Court: *I have notified the Clerk to file your written objections.*" (Emphasis added.)

As if that were not enough, petitioners tendered their instruction 25, concerning intent. (A. 1426)

There was nothing humanly possible that petitioners could have done further to make their objections and to state the grounds for the objections. The Court of Appeals stated:

". . . the trial judge gave the plaintiffs an opportunity to elaborate upon the written objections. With reference to instruction number 18, plaintiffs' counsel merely stated that it was 'repetitious'."

The district court did not "give an opportunity to elaborate." Petitioners' counsel simply volunteered as follows (A. 1359):

"Your Honor, may we note that there are 1, 5, 16, 25, 13, 17, 18 and 19 instructions tendered by the defendant which the Court has indicated he is going to give dealing with the preponderance of the evidence and the burden of proof. We object on the ground of repetition *along with the other objections we have already stated.*" (Emphasis added.)

Certainly Rule 51 was never intended for the purpose for which it was thus employed in these circumstances. If this be true, then there can be no preservation of objections to instructions.

For a Court of Appeals to say the objections were not made is hardly consistent with its responsibility. This alone should justify the granting of this writ under the supervisory powers of this Court, to insure the rights of other litigants.

PRAYER FOR WRIT OF CERTIORARI.

Wherefore, petitioners pray this Court's writ of certiorari to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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Chicago, Illinois 60603
Attorney for Petitioners

In the United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 16957

AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY and JAMES A. DOOLEY FOUNDATION, a corporation,

Plaintiffs-Appellants,

v.

JOHN W. CLARKE and JOHN W. CLARKE & Co., a corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JULY 14, 1969

Before KILEY, SWYGERT and KERNER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The plaintiffs in this action, James A. Dooley, his wife, Virginia, the Avern Trust, of which the Dooleys are the beneficiaries, and the James A. Dooley Foundation, a charitable corporation, seek damages for fraud and breach of a fiduciary relationship arising from a series of securities transactions during 1961-63 with the defendants, John W. Clarke & Co., a broker-dealer in securities, and John W. Clarke, its president.

The amended complaint charged the defendants with fraud by virtue of their alleged violation of sections

12(2) and 17(a)(1)(2) and (3) of the Securities Act of 1933, 15 U.S.C. §§771(2) and q(a)(1)(2) and (3), and certain antifraud provisions and rules promulgated thereunder of the Securities Exchange Act of 1934, section 10(b) and Rule 10b-5 and section 15(c)(1) and Rule 15c 1-2, 15 U.S.C. §78j(b), 17 CFR 240.10b-5, and 15 U.S.C. §78o(c)(1), 17 CFR 240.15c 1-2. The amended complaint further charged the defendants with a violation of section 15A(b)(7) of the Exchange Act, 15 U.S.C. §78o-3(b)(7), and sections 1, 2 and 18 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers. Compensatory damages in the amount of $152,500 and punitive damages in the amount of $295,000 were demanded.

The specific intentional and deliberate violations of the antifraud provisions of the Acts charged were that the defendants sold to the plaintiffs a substantial portion of each underwriting Clarke & Co. participated in for the purpose of realizing an underwriting profit that was larger than the commission charged in connection with the purchase of listed securities and for the purpose of avoiding any possible liability on the underwriting commitment of Clarke & Co.; that the defendants did not advise the plaintiffs of the "risks inherent" in the securities purchased by the plaintiffs; that the defendants consistently took a position adverse to the plaintiffs in that Clarke & Co. secretly dealt as a principal with the plaintiffs; and that the defendant, Clarke, made the misrepresentation that he was purchasing large blocks of securities being offered to the plaintiffs for the account of his wife and that he held large blocks of such securities.

After extensive discovery, a jury trial was held and, after denial of the defendants' motions for a directed verdict made at the close of the plaintiffs' case and after all the evidence was in, the jury returned its verdict finding the issues for the defendants. Plaintiffs' motions for judgment notwithstanding the verdict and for a new trial were denied. This appeal followed.

Since the evidence in this case is voluminous, we will discuss it only as it relates to particular errors that have been raised in this appeal. Most of the errors here relate

to questions of fact that were within the province of the jury to determine. Thus, as a court of review, our inquiry is limited to deciding whether there was substantial evidence to support the jury's verdict.

The first contention presented is that the plaintiffs were entitled to a judgment notwithstanding the verdict. The standard to be applied in determining whether they were entitled to a judgment n.o.v. was recently stated by this court in *Funk* v. *Franklin Life Ins. Co.*, 392 F.2d 913, 915 (7th Cir. 1968); "The motion is properly denied where the evidence, along with all inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions."

The plaintiffs suggest that as a matter of law a fiduciary relationship existed between plaintiffs and defendants. Support for this position is said to be found in the cases of *Charles Hughes & Co.* v. *S.E.C.*, 139 F.2d 434 (2d Cir. 1943), *cert denied*, 321 U.S. 786 (1944), *Hughes* v. *S.E.C.*, 174 F.2d 969 (D.C. Cir. 1949), and *Norris & Hirshberg, Inc.* v. *S.E.C.*, 177 F.2d 228 (D.C. Cir. 1949). These authorities are not controlling here since all present substantially dissimilar factual situations and in each the finder of fact concluded from the evidence that a relationship of trust and confidence existed between a dealer and his customer, whereas, here, the jury, by virtue of its general verdict necessarily found that such a relationship did not exist. Although there was much evidence that the defendant, Clarke, promoted a friendship with Dooley for the purpose of selling him securities, there was also evidence that Dooley acted in a manner inconsistent with his claimed financial naivete and fiduciary reliance. For example, Dooley maintained quite detailed ledger sheets covering all of his investments during the course of his dealings with the defendants. These ledger sheets reveal that Dooley had the time and interest to look after his investments and that he was aware of the nature of the securities being sold to him by Clarke, as well as Clarke's capacity. The dispute between the parties in April 1961 over the clipping by Clarke's secretary of certain mu-

nicipal bond coupons belonging to Dooley and Dooley's careful comparison pricing in September 1962 of some $1,000,000 of government bonds which he intended to purchase are further evidence of Dooley's lack of complete reliance on Clarke's financial advice and services.

A major contention of the plaintiffs is that they were defrauded by Clarke in that they did not know and Clarke did not disclose to them that he was an underwriter and, thus, when he was acting as a principal in dealing with them, Clarke was making a profit as a principal. Further, the plaintiffs assert that they did not know the difference between a principal and an agent in securities transactions until 1963. This was a question of credibility for the jury. Further, the confirmation of each sale made by the defendants to the plaintiffs stated whether the confirmed sale was made with the defendants acting in their capacity as principal or agent. The jury had reason to believe that the plaintiff, Dooley, especially in light of his legal experience and the volume of his previous securities transactions, knew the difference between principal and agent transactions and was fully cognizant of Clarke's role as underwriter.

For the first time in their reply brief, the plaintiffs urge that the defendants violated section 5(b) of the Securities Act of 1933 in that they did not always accompany or precede confirmations of sale with a final form of the prospectus. This violation of section 5(b) is said to constitute liability under section 12. At trial, the plaintiffs proceeded on the theory that the defendants failed to comply with the provisions of Rule 15c1-4, 17 CFR 240.15c1-4, promulgated under the Exchange Act of 1934. Since that rule requires only that a final prospectus be received by the customer before completion of the sale, there was no issue whether a final form prospectus preceded confirmation. The proof at trial as well as the tendered jury instructions related only to a theory of recovery under the Exchange Act Rule. Thus, the factual inquiry was whether with respect to each of the underwritings in question the plaintiffs received prior to the time payment was due a final form prospectus which disclosed that Clarke & Co. was an underwriter and the

total amount of underwriting profit. The jury instructions spoke only in terms of whether a prospectus was received prior to the time payment was due. Under the circumstances, the plaintiffs are precluded from arguing a new theory of recovery for the first time on appeal. *Cleary* v. *Indiana Beach, Inc.*, 275 F.2d 543 (7th Cir.), *cert. denied*, 364 U.S. 825 (1960); *Miller* v. *Avirom*, 384 F.2d 319 (D.C. Cir. 1967).

The plaintiffs claim that the business operations of Clarke & Co. were conducted in a manner similar to a "boiler-shop." There is no support in the record for this assertion. The securities sold by Clarke & Co. were not of the low-priced speculative variety normally associated with such operations. Additionally, there is no evidence of high-pressure selling methods or misrepresentations concerning the securities involved.

Despite the plaintiffs' contention, the evidence established that the plaintiffs authorized each transaction they had with the defendants. The plaintiffs rely on Dooley's testimony that the defendants purchased several issues on behalf of the plaintiffs without prior authorization. Clarke denied this testimony and stated that prior to selling each of the securities in question he discussed them with Dooley and obtained his approval to buy them. The jury believed Clarke. Dooley's testimony cannot be the basis for a judgment n.o.v.

The plaintiffs' final argument relating to its judgment n.o.v. contention is that certain "admissions" of John Clarke constituted a prima facie case of fraud and violation of a fiduciary relationship. We have considered these statements of defendant Clarke, most of which are innocuous or ambiguous, and do not view them in the light suggested by the plaintiffs.

The second major category of errors alleged by the plaintiffs pertains to the instructions given by the district court. The plaintiffs cite the giving or failure to give thirteen separate instructions as reversible error. We will only discuss the more substantial of the alleged errors, since we find no error in the instructions.

The plaintiffs specify as error defendants' instruction number 18, which sets forth what matters plaintiffs must

prove to show a violation by defendants of section 17(a)(1)(2) and (3) of the Securities Act and Rules 10b-5 and 15c1-2 promulgated under the Exchange Act. Plaintiffs complain that this instruction is erroneous in that the elements of wrongdoing are connected by the word "and" in the instruction given, whereas, the Act and Rules join them by the disjunctive word "or." It is our view that the plaintiffs waived their right to raise this error since at the conference on instructions and following the court's charge, they failed to make the objection that is now being relied upon. The plaintiffs' further contention that their written objections to the instructions contained the error now raised must fall. After leave was granted to file written objections just minutes before the jury was charged, the trial judge gave the plaintiffs an opportunity to elaborate upon the written objections. With reference to instruction number 18, plaintiffs' counsel merely stated that it was "repetitious." This was inadequate notice of the objection. Rule 51 of the Federal Rules of Civil Procedure precludes the assignment of error when no specific objection to an instruction is made. Likewise, the Supreme Court has expressly required that objections be specific. *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943).

Three of the instructions complained of, numbers 2, 25 and 28, were the plaintiffs' own instructions. We do not find that any jury confusion could have resulted from the asserted inconsistency between the plaintiffs' tendered instructions and the defendants' instructions numbered 18, 20 and 30. Defendants' instructions numbers 8 and 7 were taken verbatim from Mathes and Devitt, *Federal Jury Practice and Instructions* (1965). These instructions were not erroneous.

Plaintiffs claim a variety of evidentiary errors were committed by the trial judge. These errors are said to arise from the allowance into evidence of certain testimony adduced by the defendants and the exclusion from evidence of certain matters that the plaintiffs sought to introduce. It would serve no useful purpose to canvass these claims of prejudicial error. We have considered the claims and find them to be without merit.

(Opinion of the United States Court of Appeals)

Error is asserted to have resulted from the district court's striking the plaintiffs' claim for punitive damages. It is difficult to see how the plaintiffs can complain about this. Not only was their proof insufficient to persuade the jury to award compensatory damages, but also the evidence in the case was completely devoid of any hint of the wantonness, malice or impropriety that must underline a claim for punitive damages. Further, it has been held that punitive damages cannot be recovered in a private action brought under the Exchange Act and the Rules thereunder. *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527 (10th Cir. 1952). In addition, section 12(2) of the Securities Act expressly provides that the measure of damages is recovery of "the consideration paid for such security with interest thereon."

Plaintiff alleges as error the dismissal by the district judge of the claim based on violations of section 1, 2 and 18 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers. In *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 17136 (7th Cir., filed April 17, 1969), this court held that there was a private right of action for violation of Rule 405 of the New York Stock Exchange in order to protect the public. The Rules of the N.A.S.D. were enacted under section 15A of the Securities and Exchange Act. 5 U.S.C. §78o-3. Section 2 of Article III of the Rules of Fair Practice is intended "for the direct protection of investors." Lowenfels, Implied Liabilities Based Upon Stock Exchange Rules, 66 Colum. L. Rev. 12, 29 (1966). Therefore, the district judge improperly dismissed the claim for violation of section 2. However, plaintiff was not prejudiced by dismissal because the same theory was incorporated under the claim for violation of section 15 of the Securities and Exchange Act. 15 U.S.C. §78o.

We have considered the other errors raised by the plaintiffs and find them to be without substance. This lawsuit grew out of a complicated factual background. The issues of fraud and breach of a fiduciary relationship in the last analysis presented questions of credibility and fact. The jury was in the best position to make a determination of these facts. We are unwilling to overturn

the result of a trial that lasted almost three weeks and where substantial evidence supports the jury's verdict.

The judgment of the district court is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1091

AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY AND JAMES A. DOOLEY FOUNDATION, A CORPORATION,

Petitioners,

vs.

JOHN W. CLARKE AND JOHN W. CLARKE & CO., A CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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